No. 1841.

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC TERMINAL COMPANY
A CORPORATION
PLAINTIFF IN ERROR

VS.

THE UNITED STATES OF AMERICA
DEFENDANT IN ERROR

Brief of Defendant in Error

DOLPH, MALLORY, SIMON & GEARIN
ATTORNEYS FOR PLAINTIFF IN ERROR

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PORTLAND PRINTING HOUSE CO., TENTH AND TAYLOR STREETS

IN THE

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STATEMENT

The Spokane, Portland and Seattle Railway Company prior to and subsequent to and on the 12th day of May, 1909, was engaged in operating a railroad from points in the State of Washington to points in the State of Oregon, including the City of Portland, Oregon; that the Northern Pacific Terminal Company during said time owned and operated terminal railroad yards in the City of Portland and owned in connection with said yards, several railroad tracks and switches; that the switches and tracks of the Northern Pacific Terminal Company,

plaintiff in error, connected with the tracks and switches of the Spokane, Portland and Seattle Railway Company in said City of Portland, Oregon, about 1300 feet distant from the nearest unloading chute of the stock yards of the Union Stock Yards Company in said city, and constituted part of a line of road over which animals conveyed from points in the State of Washington to the Union Stock Yards Company, in said City of Portland, Oregon, reached their destination; that the said Northern Pacific Terminal Company, plaintiff in error, made a charge to and against the Spokane, Portland and Seattle Railway Company of twenty-five cents per ton with a minimum of five dollars per car for every car of said company moved by it over the switches or tracks of the said Northern Pacific Terminal Company, plaintiff in error. On the 12th day of May, 1909, at the hour of 6 P. M. of said day, the Spokane, Portland and Seattle Railway Company received from H. Brown, at Plymouth, in the State of Washington, twenty-five head of horses consigned to the Union Stock Yards Company, in the City of Portland, Oregon, the destination of said shipment of horses being, "Union Stock Yards, Portland, Oregon"; that said Spokane, Portland and Seattle Railway Company loaded said horses into Northern Pacific car No. 15,766, and transported the same to Portland, Oregon, where said carload of horses arrived at about 7 A. M. upon the 14th day of May, 1909; that said carload of horses were then placed upon a track in the yards of said Spokane, Portland and Seattle Railway Company

until 8:12 o'clock on the said 14th day of May, 1909, when they were then turned over and delivered to the Northern Pacific Terminal Company, plaintiff in error; that the said Spokane, Portland and Seattle Railway Company confined said shipment of horses in said car without unloading the same for rest, water and feeding, or for any other purpose, from the time it received and loaded them at Plymouth, in the State of Washington, at 6 o'clock P. M., on the 12th day of May, 1909, until it delivered them to plaintiff in error at 8:12 o'clock A. M., on the 14th day of May, 1909.

At 8 A. M. on the 14th day of May, 1909, the chief car clerk of the Spokane, Portland and Seattle Railway Company called up one Eckley, clerk to the yard master for plaintiff in error, and informed him that the Spokane, Portland and Seattle Railway Company had a car of horses in its yard destined to the Union Stock Yards, and that the same was overdue four hours, and requested that plaintiff in error hurry said carload of horses to the stock yards. Eckley stated that plaintiff in error "would get right after them," whereupon plaintiff in error sent an engine for the shipment of horses and transported them over its tracks to the Union Stock Yards, where they were unloaded at 8:30 A. M., or in 18 minutes after having been notified that the horses were in the yards of the Spokane, Portland and Seattle Railway Company. The said horses when unloaded were skinned and scratched up and rather gaunt. They remained in

the Union Stock Yards for several days after being unloaded and presumably were there fed and watered.

That thereafter, on the 26th day of August, 1909, defendant in error commenced an action against the Spokane, Portland and Seattle Railway Company to recover a penalty in the sum of $500.00 for violation of the Act of Congress of June 29, 1906, known as the "twenty-eight hour law," and defendant in error charged in its complaint in said action that the said Spokane, Portland and Seattle Railway Company knowingly and wilfully confined said shipment of horses in said Northern Pacific car No. 15,766 from 6 P. M. on the 12th day of May, 1909, to 7 A. M. on the 14th day of May, 1909, without unloading said horses for rest, water and feeding as required by law.

That thereafter, on the 13th day of September, 1909, the said Spokane, Portland and Seattle Railway Company appeared in said action against it and admitted the truth of the complaint, whereupon the court assessed a penalty for $250.00 against said company, judgment for which, together with the costs and disbursements of the action, was entered and thereupon paid.

That thereafter on the 16th day of September, 1909, this action was commenced against plaintiff in error; that thereafter trial was had, resulting in a verdict and judgment against plaintiff in error. It

is from the latter judgment that this writ of error is prosecuted.

Plaintiff in error by exceptions taken at the trial and its assignments of error herein, raises four questions:

I. Is plaintiff in error a railroad or common carrier whose road formed a part of a line of road over which the shipment of horses mentioned in the pleadings was conveyed from Plymouth, in the State of Washington, to the Union Stock Yards, in Portland, Oregon?

II. Where animals have been confined beyond the limit prescribed by the law, is prompt and diligent action by the last carrier in conveying them to their destination, or to pens for unloading, the test of violation of the law by such carrier, or is liability determined by whether or not the animals were "knowingly and wilfully" confined?

III. Does a carrier become liable to a penalty who receives from a connecting carrier, animals which have been confined without rest, water or feeding beyond the time permitted by law and continues the confinement for less than twenty-eight hours beyond the expiration of the first twenty-eight hour period?

The foregoing questions are raised by exceptions to the refusal of the Court to peremptorily instruct the jury to return a verdict for plaintiff in error, and

the refusal of the Court to instruct the jury as follows:

> "1. The defendant is not liable for any detention of the shipment of horses described in the complaint if such detention was of reasonable duration and necessary to the proper unloading of them in a humane manner into properly equipped pens for rest, water and feed, and if you shall find that such detention was of reasonable duration and for such purpose only, the verdict must be for the defendant.
>
> "2. It being alleged in the complaint that the shipment of horses therein described had prior to and at the time of their delivery to the defendant been continuously confined by the Spokane, Portland and Seattle Railway Company for thirty-seven hours without water, rest or feed, if you shall further find that plaintiff heretofore brought its action against the Spokane, Portland and Seattle Railway Company for so confining said horses immediately prior to their delivery to the defendant, recovered judgment in such action, and that such judgment has been satisfied, then I charge you that the time elapsed while in the possession of the Spokane, Portland and Seattle Rail-

way Company cannot be counted against this defendant."

No exceptions were taken to the instructions given by the Court, except that after the jury had retired, it returned into Court for additional instructions, and exception was taken to one statement made by the Court to the jury at that time.

Record, page 41.

POINTS AND AUTHORITIES.

I.

The destination of the carload of horses involved in this case was Union Stock Yards, Portland, Oregon.

(Government's Exhibit "A," Record, page 26.)

The nearest track or switch of the Spokane, Portland and Seattle Railway Company is 1300 feet from the nearest point of the yards of the Union Stock Yards Company.

(Record, pages 29-32.)

The car was hauled some greater distance than 1300 feet by plaintiff in error, as it stood upon the tracks of the Spokane, Portland and Seattle Railway Company several hundred feet from their connection with the tracks of plaintiff in error.

(Record, page 29.)

The shipment of horses could not reach its destination without being hauled over the tracks of plaintiff in error, and it was a regular connecting carrier of the Spokane, Portland and Seattle Railway Company for shipments destined to and delivered to the Union Stock Yards. Plaintiff made a charge for such deliveries of twenty-five cents per ton with a minimum charge of $5.00 per car against its connecting carrier, the Spokane, Portland and Seattle Railway Company.

(Re-direct examination G. M. Glines, Record, pages 30 and 31.)

The foregoing state of facts makes plaintiff in error a railroad whose road forms a part of a line of road over which the shipment of horses involved in this case was conveyed.

United States vs. New York Cen. & R. R. Co., 156 Fed. 249;

United States vs. Sioux City Stock Yards Co., 162 Fed. 556;

United States vs. Colorado & N. W. R. R. Co., 157 Fed. 3221-323;

XXV Opinions Atty. Gen'l., 411.

Besides, plaintiff in error did not request the Court to define to the jury the meaning of the phrase, "railroad * * * * * whose road forms any part of a line of road over which * * * * * animals shall be conveyed from one State * * * * * into or through another State * * * * *" as used in the twenty-eight hour law, but requested the Court to direct a verdict in its favor upon the ground that the evidence failed to show it was a railroad described in the foregoing phrase; neither did it except to the instructions given by the Court upon that question.

There was not only some evidence that plaintiff in error was a connecting carrier within the meaning of the law, but the evidence showed unquestionably that it was such a carrier. The Court was therefore correct in refusing to direct a verdict for plaintiff in error.

Wrightman vs. Corporation, 1 Black, 39, 49.

Hickman vs. Jones, 76 United States, 197.

The above citations also apply to the other grounds upon which the motion for a directed verdict was based. However, no claim is made by plaintiff in

error that said motion should have been granted for any reason except the one above discussed, and no very strenuous claim is made that it should have been granted upon that ground.

II.

Plaintiff in error contends that it did not "knowingly and wilfully" fail to comply with the provisions of the twenty-eight hour law within the meaning of that Act.

The chief car clerk of the Spokane, Portland and Seattle Railway Company notified plaintiff in error by telephone that it had the car of horses in question and that they were overdue four hours and requested plaintiff in error to receive the car of horses and hurry them to the Union Stock Yards.

Testimony of R. L. Osborne, Record, page 36.

By overdue, the witness explained that he meant that the time for unloading the horses was overdue. The Spokane, Portland and Seattle Railway Company communicated with the plaintiff in error by telephone in order to secure plaintiff in error to hurry the car to the Union Stock Yards to be unloaded, and plaintiff in error consented to get the car of horses to the Stock Yards and get it unloaded.

Mr. Eckley, clerk to the yard master of plaintiff in error, made no objection to taking the stock under those conditions, but promised he would "get right after them."

Testimony R. L. Osborne, Record, page 37.

Plaintiff in error was notified and requested to take the horses to the Union Stock Yards Company as above, at 8:12 A. M. on May 14, 1909. It was not customary to 'phone the arrival and delivery of cars to the Terminal Company, delivery being made on a switch. The first notification the Terminal Company usually gets is a switch list when they get an ordinary shipment. Plaintiff in error was notified of the shipment in question because it was a shipment of live-stock.

Testimony G. M. Glines, Record, page 28.

The horses were unloaded at 8:30 A. M. at the Union Stock Yards. Unloading of the horses began at 8:30 A. M. All there was to do was to open the door and let the horses run out. It did not take more than a minute or two to unload them.

Testimony W. M. Caudy, Record, pages 33 and 34.

The shipment of horses was delivered by the Spokane, Portland and Seattle Railway Company, plain-

tiff in error, for the purpose of being transported to the Union Stock Yards, and there unloaded, and the same could not have been conveyed to their destination without going over the lines of the plaintiff in error. The Union Stock Yards Company was the only place in the vicinity where the horses could have been unloaded and fed.

Testimony G. M. Glines, Record, pages 30-31.

The foregoing statement of the facts shows that plaintiff in error received the shipment of horses in question with knowledge that they had been confined beyond the time prescribed by law, and knowing such fact conveyed them to their destination.

"Knowingly," as used in the twenty-eight-hour law, means with knowledge of the facts.

St. Louis and S. F. R. Co., vs. U. S., 169 Fed. 69.

"Willful" in the twenty-eight-hour law means only the intentional doing of an act forbidden by statute.

U. S. vs. Union Pacific R. Co., 169 Fed. 65.

It is synonymous with "voluntarily" and "intentionally."

U. S. vs. Atchison & Santa Fe R. Co., 166 Fed. 160.

The words "knowingly and willfully" in the twenty-eight-hour law do not import an evil intent or motive. If the carrier has knowledge of the facts and fails to comply with the law such failure is willful.

U. S. vs. Atlantic Coast Line Co.;
U. S. vs. Sioux City Stock Yds. Co., 162 Fed. 566.
U. S. vs. N. Y. C. & Hudson Riv. R. Co., 165 Fed. 833.

The term "knowingly and willfully" as used in the twenty-eight-hour law has been frequently defined by trial courts. Many of these cases are unreported. The definitions so given have generally been acquiesced in by the railroads and accepted as correct.

District Judge R. S. Bean in the case of
U. S. vs. Southern Pac. Co.,

tried in the district of Oregon on June 16, 1909, defined that term as follows:

> "The word 'knowingly' as used in the law simply means with knowledge of the facts
> * * * * *
> " 'Willful' as used in this statute means intentionally and voluntarily."

District Judge Lewis in—
U. S. vs. Colorado and Southern Ry. Co.,

tried in the district of Colorado in June, 1908, defines the term as follows:

> "If the defendant company knew, or could by the exercise of reasonable inquiry have ascertained that these sheep had not been unloaded from the time that they were first put upon the cars at 5:15 P. M., October 3rd, then it had knowledge of the fact, and its failure thereafter to comply with the statute, if it did fail, was a willful failure."

District Judge Meek, in—

U. S. vs. Fort Worth Belt Ry. Co.,

a case tried in the northern district of Texas, instructed the jury as follows:

> "The word 'knowingly' as here used implies that the railroad of whose default the expression is used, either knew of the fact that the hogs had not been unloaded for rest, food and water within the prescribed time or had means of knowledge of which it was bound to avail itself, and which if followed by diligent inquiry would have brought the fact home to it. The word 'willful' as here used implies that the defendant was a free agent and that what defendant did arose from the spontaneous action of its will, that defendant knew what is was doing and intended to do what it did do. * * * * *

> "One is charged with knowledge not only of specific and certain things, but also with knowledge of what he might find out by reasonable diligence in making inquiry. * * * * *"

The last mentioned case was against a terminal company which undertook to transport a car load of hogs from its connection with the Chicago, Rock Island and Gulf Ry. Co., less than a mile distant, to the destination of the shipment, the Fort Worth Stock Yards. At the time the terminal company received the stock it had been confined 32 hours and 40 minutes. The terminal company allowed it to remain in the cars an additional five hours and 35 minutes before unloading.

The plaintiff in error before taking the horses was notified by its connecting carrier that the same had been confined in violation of the twenty-eight-hour law, and it therefore had such knowledge brought to it within the meaning of the term "knowingly," as used in the twenty-eight-hour law. Having knowledge of the facts, it purposely and intentionally received the horses and transmitted them to their destination, and accordingly confined them for such additional time as they were standing upon and passing over its switches and tracks.

Plaintiff in error therefore knowingly and willfully confined the horses and failed to comply with sec-

tions 1 and 2 of the twenty-eight-hour law within the meaning of said law as defined by the decisions above cited.

If plaintiff in error had received the horses in question for the purpose of transporting them to their destination and such destination had been forty miles instead of 1300 feet, and the necessary confinement before reaching such destination had been two hours and a half instead of eighteen minutes, liability would clearly attach, yet the construction demanded would create an exception that would apply to the supposed case.

Plaintiff in error demands that a construction be placed upon the law to the effect that where a connecting carrier receives animals for the purpose of transporting them to their destination or to yards and pens for unloading, and promptly transports them to their destination or place of unloading, such carrier shall not be held to have confined the animals, willfully, within the meaning of the law. Such a construction would except from the terms of the law, Terminal and Stock Yards Companies, and all other carriers thansporting animals for a short time before the shipments comprising the same reached their destination. The only requirement necessary to create an exception to the statute in such cases would be that the last carrier acted promptly.

If such construction could be secured, it would then make no difference whether or not the stock was received by the last carrier after it had been

confined longer than twenty-eight hours. Acting promptly by the last carrier would relieve it of the charge of having confined the animals willfully.

The next construction demanded then would be that in cases where the previous carrier had not confined the stock more than twenty-eight hours and the last carrier had acted promptly, notwithstanding the stock had been confined over twenty-eight hours in the aggregate, no penalty should be imposed. This because the first carrier had parted with possession of the stock before the twenty-eight-hour period had expired and the last carrier had acted promptly, and before we know it, the vitality of the twenty-eight hour law would be completely sapped by construction.

The law was manifestly intended to compel carriers to construct and maintain feeding yards at such short intervals along their lines of road that its terms could be readily complied with, and also to require that such pens and yards be so constructed and so maintained that animals could be properly fed and watered therein and might be enabled to rest comfortably while in such pens, and, moreover, directed that animals so unloaded should be allowed to remain for five hours before reloading.

The construction contended for by plaintiff in error would to a large extent do away with the necessity of maintaining feeding, watering and resting places plainly required by the law.

Carriers of livestock are much concerned lest a

construction be put upon the law that will work hardship or inconvenience upon them, but they never have been in anywise concerned regarding the hardship and cruelty to animals transported by them, nor about the loss to owners by reason of such cruelty and hardship, nor the unwholesomeness of the food consumers were obliged to eat by reason of such cruelty and hardship.

We realize that an unreasonable construction of the law cannot be justified upon the ground that carriers have heretofore handled shipments of animals harshly and indifferently, but the fact that such carriers utterly disregarded this law for thirty years under mild enforcement thereof, demonstrates the necessity of strict enforcement in order to secure a reasonable compliance with its terms.

It is believed, however, that the question of whether plaintiff in error acted "knowingly and willfully" was one to be determined by the jury from the facts under proper instructions from the Court. The trial court in this case correctly defined the terms "knowingly" and "willfully" to the jury and instructed them that it was the sole judge of the character of the action of plaintiff in error, relating to the confinement of the horses. No exception was taken to the instructions given, but defendant requested the Court in effect to withdraw from the jury, consideration of whether plaintiff in error acted "knowingly and willfully," and confine the jury to the questions of whether plaintiff in error received the

horses for the purpose of conveying them to pens for unloading and whether it acted promptly. The instruction requested by plaintiff in error was as follows:

> "The defendant is not liable for any detention of the shipment of horses described in the complaint if such detention was of reasonable duration and necessary to the proper unloading them in a humane manner into properly equipped pens for rest, water and feed, and if you shall find that such detention was of reasonable duration and for such purpose only, the verdict must be for the defendant."

The request was manifestly erroneous as it made the liability of plaintiff in error dependent upon whether the horses were being conveyed to pens for unloading and whether action to that end had been prompt, when the statute and the instructions of the Court made confinement beyond twenty-eight hours "knowingly and willfully" participated in by plaintiff in error the test of liability.

In a case in the Western District of Missouri against the St. Joseph Stock Yards Company, where the defendant received the stock after the expiration of the time prescribed by law and promptly conveyed

them to the stock yards, Judge Smith McPherson in deciding the case used the following language:

> "After the defendant received the cattle it acted promptly and quickly. But that is not defensive; such action is in mitigation." (Not reported.)

The requested instruction, we have shown, is incorrect. No exception was taken to the instructions of the Court. If plaintiff in error asked for an erroneous instruction, it cannot now complain because the Court refused to give it, and certainly it cannot be heard to complain of instructions given by the Court, to which it did not except.

The question was clearly one for the jury. It was submitted under proper instructions. Because the verdict is distasteful to plaintiff in error is not sufficient to justify setting it aside.

III.

Plaintiff in error contends that inasmuch as it received the shipment of horses after its connecting carrier had become liable to the penalty and unloaded the horses before the expiration of a second twenty-eight-hour period, a penalty cannot be assessed

against it; in support of this contention the following authorities are cited:

U. S. vs. Sioux City Stock Yards Co., 162 Fed. 561;

U. S. vs. Stock Yards Terminal Co., 172 Fed. 452, 178 Fed. 19.

This contention, if allowed, would in a large measure destroy the efficiency of the twenty-eight-hour law; besides, it is contrary to the plain purpose and intent of the law.

The object and purpose of this Act is to prevent or reduce to a minimum the cruelty incident to the transportation of stock.

United States vs. Southern Pacific Co.

The Act is a humane Act intended to prevent cruelty to animals.

United States vs. Pere Marquette R. Co., 171 Fed. 586.

The primary purpose of the statute is to alleviate the condition of dumb animals in transit.

U. S. vs. Union Pacific Railroad Co., 169 Fed. 65.

The Act has a two-fold purpose: To prevent the cruel treatment of animals in their handling and care and to subserve the interest of the owner.

U. S. vs. O. R. & N. Co., 163 Fed. 640.

The primary purpose is to prevent cruelty to animals while in course of transportation by railroads or other conveyance. It may also have been to prevent damages to the owners by reason of such confinement.

U. S. vs. Sioux City Stock Yards Co., 162 Fed. 556.

The general purpose of the statute is to prohibit the inhuman treatment of domestic animals in possession of common carriers.

U. S. vs. Oregon Short Line Railroad Co., 160 Fed. 526.

The object and purpose of the Act is to insure the humane treatment of animals in their interstate transportation upon cars.

U. S. vs. Southern Pacific Co., 157 Fed. 459.

The purpose of the twenty-eight-hour law is to prevent any carrier from transporting animals in

interstate commerce for a longer period than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water and feeding * * * * *

> "In estimating such confinement, the time consumed in loading and unloading shall not be considered, BUT THE TIME DURING WHICH THE ANIMALS HAVE BEEN CONFINED WITHOUT SUCH REST OR FOOD ON CONNECTING ROADS SHALL BE INCLUDED, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours."
>
> Section 1, Twenty-eight-Hour Law, 34 Stat. L. 607.

Congress did not enact the twenty-eight-hour law for the purpose of collecting or securing revenue, but to prevent cruelty to animals in interstate transportation. To accomplish the design and purpose of the law, Congress expressly prohibited continuous confinement of animals by interstate carriers for a period of more than twenty-eight hours. The penalty imposed by the law is merely incidental and is imposed to effect the purpose of the law and not to produce revenue to the United States. It is no less cruel to animals to confine them more than twenty-eight hours where two carriers participate in such

confinement than where only one causes the same. If the contention of plaintiff in error be correct, it might have knowingly and willfully confined the shipment of horses involved in this case in cars upon its tracks for eighteen hours after receiving the same without becoming liable to a penalty. Payment in such case of a penalty by the preceding carrier would in no-wise tend to alleviate the cruelty to the animals nor to prohibit or deter plaintiff in error from unlawfully confining them.

The twenty-eight-hour law provides that the time during which the animals have been confined without rest, food or water on connecting roads shall be included. If a carrier receives animals from a connecting carrier with knowledge that they have been confined for a period of twenty-seven hours and itself confines the same for more than an hour thereafter, the penalty provided by law attaches.

Let us suppose that a stock yards company or terminal company receives a shipment of cattle which has been confined twenty-seven hours and after receiving the same allows them to stand upon the tracks in its yards for six hours before unloading. In that case there can be no question of its liability, neither can there be any question of cruelty to the animals. Now, would it be any less cruel to those same animals had the stock yards or terminal company received the same after they had been confined by the previous carrier twenty-eight hours and thirty minutes, if it then permitted them to stand

upon its tracks for four and one-half hours before unloading them? The animals would have been confined the same length of time in either case. Their treatment would have been just as harsh. The stock yards or terminal company contributed just as much in one case as the other to the cruelty imposed upon the animals. The fact that the previous carrier is compelled to pay a penalty in the latter case, would in no-wise deter or prevent the company last confining the stock from acts of cruelty to like shipments if the contention of plaintiff in error is correct, for then there would be no liability upon the part of the last carrier for cruel treatment to stock.

No more reason exists for including the time the animals have been confined by previous carriers where delivery is had to the second carrier before the expiration of the twenty-eight-hour period, than if such delivery had been had subsequent thereto. The result to the animals confined is just the same in either case where the total confinement is extended for the same period. There is nothing in the law providing that the computation of the time of confinement should, in any case, commence after the expiration of twenty-eight hours, but on the other hand, it expressly directs that the time shall commence from the beginning of the confinement.

No construction should be placed on the Act which recognizes exceptions to its provisions other than those expressly set out therein, especially where such construction would impair its effectiveness. Indeed,

rules of construction prohibit such an interpretation of the Act.

The law recognizes a number of contingencies and circumstances upon which the penalty shall not attach, but the one contended for by plaintiff in error is not expressed in the law, therefore, the exceptions insisted upon cannot be allowed.

Section 1 of the Act prohibits **any railroad** from confining animals beyond the prescribed period, and provides that in ascertaining whether confinement has continued beyond the limit of time allowed, the time the animals have been confined by a previous carrier shall be added to the time such animals have been confined by the carrier against whom it is sought to assess the penalty; if the total exceeds twenty-eight hours (or thirty-six hours if the time has been extended), the prohibition of the statute has been violated. Section 3 of the Act provides that any railroad, etc., who fails to comply with the provisions of Sections 1 and 2, shall for every such failure be liable, etc. No exception is made of animals that have already been confined longer than twenty-eight or thirty-six hours, before coming into the possession of the carrier sought to be charged, or of Terminal or Stock Yards Companies, receiving and confining the animals. All confinements of animals beyond the period prescribed are prohibited, and every carrier is liable

for a violation of the prohibition. The test of liability is whether the total confinement exceeds twenty-eight hours or thirty-six hours if the time has been extended, and not the time the animals may have been in the possession of a previous carrier or what liabilities such previous carrier may have incurred or paid in connection with the shipment.

Attorney General Moody, now Associate Justice of the Supreme Court, in passing upon the question under consideration, said:

> "* * * Upon the facts stated it is my opinion that the law applies to these terminal railroad companies.
>
> "The statute is unambiguous and is clearly designed to prevent any 'railroad company within the United States whose railroad forms any part of a line of road over which cattle, sheep, swine or other animals are conveyed from one State to another,' from transporting such animals under conditions other than those set forth in the statute.
>
> "It seems to be clear from your statement of the facts that these terminal companies accept stock for transportation to the National Stock Yards that has already been confined for more than twenty-eight consecutive hours without unloading for feed,

rest and water. That being so, the companies are undoubtedly liable for the penalty which the statute provides."

25 Opinions Attorney-General, 411;

U. S. vs. New York C. & H. R. R. Co., 156 Fed. 249.

Based upon the opinion of Attorney-General Moody, a very large number of prosecutions have been instituted against Terminal and Stock Yard Companies in cases where animals had been confined more than twenty-eight hours before delivery to the defendants. In most of these cases. penalties have been imposed and paid. The effect has been very salutary. Carriers of livestock, including Terminal and Stock Yards Companies, are thus made to realize that strict compliance with the law is required and they have become active in its observance instead of indifferent thereto as heretofore.

To recognize the contention of plaintiff in error would tend in a large measure to a return of the evils which the law is designed to prevent. Practically this same law has been in force since 1873. (R. S. 4386-4390.) Carriers, however, treated the same with utter disregard until vigorous enforcement of its provisions was undertaken by the Government in the last few years.

It is manifest that the second instruction requested by plaintiff in error does violence to the intent and

purpose of the Act as expressed therein and as held by the Courts, and is in contravention of the plain and express language thereof; also that the construction insisted upon and embodied in the requested instruction, would engraft exceptions onto the law not authorized by its provisions and would greatly impair and destroy its effectiveness. No error was therefore committed by the Court in refusing the instruction requested.

IV.

Suggestion is made that plaintiff in error would have been involved in an offense under a State statute had it refused to accept the shipment of horses. This Court is concerned with the acts of plaintiff in error in this case and cannot be called upon to determine the results of something which did not occur: In the next place, the shipment was interstate in character and the State statute could not apply thereto, especially where a Federal statute existed regulating the matter.

The direction of the Court that plaintiff in error was not obliged to accept and convey the horses if such action would involve in an offense under the Federal statute, was therefore correct.

V.

No exception was taken to instructions given by the Court. Exception was taken only to the refusal of the Court to give the instructions requested by plaintiff in error. We have hereinbefore demonstrated that the instructions requested were erroneous.

Juries can ordinarily be trusted to return just verdicts under proper instructions by the Court upon the question of whether the alleged failure to comply with the law in the particular case was "knowingly and willfully" committed. To our mind this case does not present any necessity for maiming the twenty-eight-hour law by construction. Moreover, before there can be any room for construction, there must be some ambiguity, uncertainty or conflict in the provisions of the law itself. The language of the statute under consideration is unambiguous, certain, and no provision thereof conflicts with another. Its purpose and meaning is plain and expressed in unmistakable language.

Claim is made that the construction placed upon the law by the trial court is unreasonable and works such hardship and inconvenience and is so absurd as to authorize this Court to except plaintiff in error from the provisions of the law.

Upon this question nothing seems more pertinent than the language of this Court in the case of

Re Fixen, 102 Fed. 295-298,

where this same question was under consideration.

Judge Morrow in speaking for the Court says:

> "The first observation pertinent to the consideration of this rule is that the province of construction lies wholly in the domain of ambiguity.
>
> 'Hamilton vs. Rathbone, 175 U. S., 414-421.'

> "It must therefore appear that the statute is ambiguous and thus open to construction.
>
> " 'The consideration of evil and hardship may properly exert an influence in giving construction to a statute when its language is ambiguous or uncertain or doubtful, but not when it is plain and explicit. The same may be said of the consideration of convenience, and in fact of any consequences. If the intention is expressed so plainly as to exclude all controversies and is one not controlled or affected by any provisions of the constitution, it is the law and courts have no concern with the effects and consequences; their simple duty is to execute it.'

"Sutherland Statutory Construction, par. 324."

Counsel has cited four cases on the question under consideration. We think they do not apply. There, the Courts were construing statutes, the meaning of which was not plain; besides, results prevented by the construction given, were most absurd in their nature or were in violation of the orderly administration of the law or contrary to the most firmly established institutions of the country. No such important considerations are present in this case calling for the grafting of an exception upon the law. Besides, no question was properly before the Court upon which a decision can properly be made requiring a construction of the law in the regard mentioned. This disposes of all the errors assigned by plaintiff in error, together with all suggestions made by it calling for a reversal of the case.

It is submitted that the judgment should be affirmed.

JOHN McCOURT,
United States Attorney for the
District of Oregon.

STATE OF OREGON,
County of Multnomah. } ss.

Due and legal service of the foregoing brief is hereby accepted and the receipt of a true copy thereof is hereby acknowledged.

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Attorneys for Plaintiff in Error.

STATE OF OREGON,
County of Multnomah. } ss.

I, John McCourt, hereby certify that I am United States Attorney for the District of Oregon and attorney for defendant in error in the within entitled action; that I prepared the foregoing copy of brief and have carefully compared the same with the original thereof and it is a true and correct transcript of the said original and the whole thereof.

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